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FREECYCLESUNNYVALE,

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT

OAKLAND DIVISION

FREECYCLESUNNYVALE, a California unincorporated association, Plaintiff, v. THE FREECYCLE NETWORK, an Arizona corporation, Defendant.	Case No. C06-00324 CW **PLAINTIFF AND COUNTERDEFENDANT FREECYCLESUNNYVALE'S NOTICE OF MOTIONS AND MOTIONS TO DISMISS COUNTERCLAIMS UNDER FED.R.CIV.P. 12(b)(6) AND TO STRIKE STATE-LAW COUNTERCLAIM UNDER CAL. CODE. CIV. PROC. § 425.16** Date: June 9, 2006 Time: 1:30 p.m. Before: Hon. Claudia Wilken Location: Courtroom 2
THE FREECYCLE NETWORK, INC., an Arizona Corporation, Counterclaimant, v. FREECYCLESUNNYVALE, a California unincorporated association, Counterdefendant.	

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TO DEFENDANT AND COUNTERCLAIMANT THE FREECYCLE NETWORK, INC., AND ITS ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that on June 9, 2006, at 1:30 p.m., or as soon thereafter as the matter may be heard, Plaintiff and Counterdefendant FreecycleSunnyvale shall move this Court to dismiss Defendant and Counterclaimant The Freecycle Network, Inc.'s counterclaims and to strike Defendant and Counterclaimant The Freecycle Network, Inc.'s state-law claim.

The motion to dismiss respectfully asks this Court to dismiss Defendant and Counterclaimant The Freecycle Network, Inc.'s counterclaims on the ground that Defendant and Counterclaimant has failed to state a claim for relief under Fed.R.Civ.P 12(b)(6). The motion to strike respectfully asks this Court to strike Defendant and Counterclaimant The Freecycle Network, Inc.'s California state-law counterclaim on the ground that Defendant and Counterclaimant's state-law counterclaim violates Cal.Code.Civ.Proc. § 425.16.

Plaintiff and Counterdefendant's motion to dismiss is supported by the following Memorandum of Points and Authorities, the [Proposed] Order, the Request to Take Judicial Notice, the file in this matter, any records of which the Court may take judicial notice, and any argument that may be heard by the Court. Plaintiff and Counterdefendant's motion to strike is supported by the following Memorandum of Points and Authorities, the [Proposed] Order, the Request to Take Judicial Notice, the Declaration of Timothy Oey, the file in this matter, any records of which the Court may take judicial notice, and any argument that may be heard by the Court.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This action involves two organizations, both of whom operate not-for-profit and use the word "freecycle." "Freecycling" is the practice by which a person with an unwanted item, a "freecycler," gives the item away rather than destroying the item or sending the item to a landfill. Defendant and Counterclaimant The Freecycle Network, Inc. ("TFN"), an Arizona corporation, coordinates a network of local freecycling groups. TFN seeks to control freecycling by asserting trademark rights to "freecycle." Plaintiff and Counterdefendant FreecycleSunnyvale ("FreecycleSunnyvale"), a California unincorporated association that operates in Sunnyvale, California, is a local freecycling group that formerly participated in TFN's network. FreecycleSunnyvale believes that "freecycle" is a generic term. FreecycleSunnyvale filed this action, seeking declaratory and other relief from TFN's actual and threatened enforcement of alleged trademark rights.

What may seem a straightforward trademark dispute was procedurally complicated when, on April 4, 2006, TFN filed a trademark and unfair competition action against Tim Oey, a member of FreecycleSunnyvale. *The Freecycle Network v. Tim Oey and Jane Doe Oey*, CV 06-173-TUC-RCC (D. Ariz. filed April 4, 2006). TFN's Arizona action followed on the heels of this Court's announcements, at the March 31, 2006 hearing, that this Court would not dismiss FreecycleSunnyvale's declaratory relief claim and that this Court would refer the parties to mediation. After TFN filed the Arizona action, TFN then filed its trademark and unfair competition counterclaims against FreecycleSunnvale in this Court on April 14, 2006. Answer to Amended Complaint and Counterclaims (Filed Apr. 23, 2006; Document 23) ("Answer and Counterclaims").

TFN also made the action before this Court more burdensome by filing counterclaims which reveal a lack of familiarity with the most basic and rudimentary principles of trademark law. The most egregious example is TFN's claim of infringement under § 32(1) of the Lanham Act. Answer and Counterclaims ¶ 74. Section 32(1) of the Lanham Act grants standing only to the "registrant" of a trademark. 15 U.S.C. § 1114(1). TFN is not a "registrant" whose trademark registration has issued because, as TFN affirmatively alleges, its registration "application is still pending." Answer and Counterclaims ¶ 25. At a minimum, TFN's counterclaims should be dismissed so that TFN can purge its fatally deficient counterclaim under § 32(1) of the Lanham Act.

TFN's other counterclaims suffer deficiencies that TFN likely cannot cure by re-alleging, especially given the positions that TFN has taken in its Arizona action. In the interests of judicial economy, FreecycleSunnyvale respectfully asks this Court to take judicial notice of court records in TFN's Arizona action.[1] FreecycleSunnyvale also requests this Court to dismiss all of TFN's counterclaims and to strike TFN's state-law claim. That way, if TFN decides to re-allege a counterclaim, TFN will be on notice to refrain from again interposing frivolous counterclaims.

II. STATEMENT OF THE ISSUES TO BE DECIDED

1. Has TFN failed to allege standing under § 32(1) of the Lanham Act, where TFN alleges that its "application is still pending"?

2. Has TFN failed to state a claim for contributory trademark infringement where TFN has not alleged that any third party has infringed or that FreecycleSunnyvale intended, knew, or should have known that a third party would infringe?

3. Has TFN failed to state a claim under § 43(a) of the Lanham Act where TFN has not alleged a protectable trademark interest or that consumers likely will be confused or misled?

4. Has TFN based its California state-law unfair competition claim on acts that arise from FreecycleSunnyvale's protected free speech activity?

III. STATEMENT OF FACTS

A. TFN's Trademark and Unfair Competition Counterclaims

1. Factual and Procedural Background

The event that precipitated this action happened when TFN obtained extra-judicial self-help to enforce its alleged trademarks by terminating FreecycleSunnyvale's Yahoo! online group account on November 21, 2005. FreecycleSunnyvale had used that group account to provide an

[1] Accompanying this Memorandum is FreecycleSunnyvale's request that this Court take judicial notice of court records TFN's Arizona action. Attached to that request are copies of the court records that FreecycleSunnyvale cites in this Memorandum.

online forum for freecyclers in the local Sunnyvale area to announce unwanted items and to arrange freecycling exchanges. TFN now admits that it "requested that the Yahoo! group 'FreecycleSunnyvale' be removed from the Yahoo! Web site because it included marks infringing upon The Freecycle Network's trademark interests." Reply to FreecycleSunnyvale's Opposition to Motion to Dismiss, at 6:8-10 (Filed Mar. 16, 2006; Document 12).

On January 18, 2006, FreecycleSunnyvale filed this action, alleging just two claims for relief. The first seeks a declaration that FreecycleSunnyvale's use of "freecycle" and "freecycling" does not constitute trademark infringement or, in the alternative, that those terms are generic or that TFN engaged in naked licensing. Complaint for Declaratory Judgment of Trademark Non-Infringement and Tortious Interference with Business Relations ¶¶ 39, 40, 41 (Filed Jan. 18, 2006; Document 1) ("Complaint"). The second claim sought damages for intentional interference with business relations when TFN intentionally caused Yahoo! to terminate an existing contract. *Id.* ¶ 49.

On February 22, 2006, TFN filed a motion to dismiss. At oral argument on March 31, 2006, this Court brushed aside TFN's contentions regarding FreecycleSunnyvale's claim for declaratory relief on the trademark issues. This Court did, however, grant FreecycleSunnyvale leave to amend its allegations concerning damages on the second claim for tortious interference. Order Denying in Part and Granting in Part Defendant's Motion to Dismiss (Filed Apr. 4, 2006; Document 19). FreecycleSunnyvale filed an amended complaint on April 6, 2006, alleging its tortious interference injury in greater detail but waiving its rights to recover monetary damages on the ground that the freecycling public will be better served if TFN uses its resources to promote freecycling rather than to pay damages to FreecycleSunnyvale. Amended Complaint for Declaratory Judgment of Trademark Non-Infringement and Tortious Interference with Business Relations ¶ 55 (Filed Apr. 6, 2006; Document 20) ("Amended Complaint"). FreecycleSunnyvale now seeks an injunction preventing TFN from filing false claims of trademark infringement with Yahoo! and other providers of internet services. *Id.* at ¶ 54.

On April 14, 2006, TFN answered and added three counterclaims. The first alleges both direct infringement under § 32(1) of the Lanham Act and contributory trademark infringement under § 43(a) of the Lanham Act. 15 U.S.C. §§ 1114(1), 1125(a). The second alleges unfair competition under § 43(a) of the Lanham Act. 15 U.S.C. § 1125(a). The third alleges a California state-law claim for unfair competition. Cal. Bus. & Prof. Code §§ 17200 and 17500. TFN seeks an injunction and monetary damages.

2. TFN's First Counterclaim in the California Action

a. Standing Allegations under § 32(1) of the Lanham Act

In its first counterclaim, TFN alleges infringement of a registered trademark under § 32(1) of the Lanham Act, which provides that the infringer of a federally registered mark "shall be liable in a civil action by the *registrant*." 15 U.S.C. § 1114(1) (emphasis added). In support of standing, TFN alleges that, "the United States Patent and Trademark Office ('PTO') approved registration of the mark FREECYCLE and its distinctive logo on the Principal Register on November 28, 2005. The PTO issued a notice of publication . . . on December 28, 2005." Answer and Counterclaims ¶ 68.

TFN has filed a trademark application, but TFN is not a "registrant." The PTO published the mark for opposition in the Official Gazette on January 17, 2006, and FreecycleSunnyvale promptly filed an opposition on January 18, 2006. Notice of Lodging of Authority, Exhibit 1 at 2 (Filed February 22, 2006; Document 7).[2] TFN does not, and cannot, allege that the PTO has granted TFN a registration number, issued it a certificate of registration, or entered any of its marks on the Principal Register. As TFN concedes: "The Freecycle Network further admits that the application is still pending." Answer and Counterclaims ¶ 25. TFN is not, and cannot be, a "registrant" under § 32(1) of the Lanham Act. 15 U.S.C. § 1114(1).

b. Contributory Infringement under § 43(a) of the Lanham Act

In its first counterclaim, TFN also alleges contributory trademark infringement under § 43(a) of the Lanham Act. 15 U.S.C. § 1125(a). TFN alleges only that FreecycleSunnyvale

[2] At TFN's request, this Court took judicial notice of this Exhibit in Order Denying in Part and Granting in Part Defendant's Motion to Dismiss 5:2-4 (Filed April 4, 2006; Document 19).

"continues to encourage others to use The Freecycle Network's Marks." Answer and Counterclaims ¶ 73. Nowhere does TFN allege that FreecycleSunnyvale intended, knew, or had reason to know that those "others" would use "freecycle" in a manner that constitutes infringement. Nor does TFN allege what those "others" ever did, much less if those "others" used "freecycle" in a manner that resulted in any likelihood of confusion among consumers. At best, TFN only complains of FreecycleSunnyvale's disagreement with TFN's decision to assert trademark rights in the generic word "freecycle."

3. TFN's Second Counterclaim in the California Action

In its second counterclaim, TFN alleges unfair competition under § 43(a) of the Lanham Act. 15 U.S.C. § 1125(a). TFN incorporates, by reference, allegations from the first counterclaim. Answer and Counterclaims ¶ 78. In the first counterclaim, TFN alleges that it is "the sole owner" of "distinctive and famous trademarks," that it "has been using [the marks] exclusively and continuously since at least May 1, 2003," and that it "has built up and now owns valuable goodwill that is symbolized by these Marks," *Id.* ¶¶ 67, 69. In the first counterclaim, TFN also alleges that FreecycleSunnyvale "continues to use The Freecycle Network's Marks through a new Yahoo! group account with the name 'SunnyvaleFree.' " *Id.* ¶ 71. From this, TFN concludes, in the first counterclaim, that FreecycleSunnyvale has directly infringed under § 32(1) of the Lanham Act. 15 U.S.C. § 1114(1). This conclusion, in the first counterclaim, is made by parroting the language of § 43(a)(1)(A) of the Lanham Act: "Such use by [FreecycleSunnyvale] are [sic] likely to cause confusion, to cause mistake, or to deceive as to the origin, sponsorship, or approval of such products and services as to the affiliation, connection, or association with [TFN]." Answer and Counterclaims ¶ 74.[3]

The only allegation added by the second counterclaim is a conclusion that parrots the language in § 43(a)(1)(B) of the Lanham Act: TFN alleges that FreecycleSunnyvale's "use of [TFN's] Marks in connection with their own re-using, recycling, and gifting services

[3] *Cf*. 15 U.S.C. § 1125(a)(1)(A) ("likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association . . . or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities").

misrepresents the nature, characteristics, and qualities of [TFN's] services and products." Answer and Counterclaims ¶ 79.[4] TFN's second counterclaim is an uncertain reference to the first counterclaim, dressed in the language of § 43(a) of the Lanham Act. 15 U.S.C. § 1125(a).

4. TFN's Third Counterclaim in the California Action

In its third counterclaim, TFN alleges California state-law claims for unfair competition. Cal. Bus. & Prof. Code §§ 17200 and 17500. This counterclaim incorporates, by reference, allegations from the first and second counterclaims. Answer and Counterclaims ¶ 82. The only incorporated allegations that seem relevant are the ones just identified in the context of TFN's second counterclaim and, perhaps, an allegation, in the second counterclaim, that FreecycleSunnyvale "continues to encourage others to use The Freecycle Network's Marks." *Id.* ¶ 73. The only allegation added by the third counterclaim is a conclusion that, again, parrots statutory language: "[FreecycleSunnyvale] has engaged in unlawful and unfair business practices, and has conducted unfair, deceptive, and misleading acts." *Id.* ¶ 83.[5] TFN's third counterclaim is a reference to prior, federal counterclaims, this time dressed in the language of California statutes.

B. TFN's Arizona Action

After this Court announced at the March 31, 2006, hearing that this Court would not dismiss FreecycleSunnyvale's declaratory relief action on the trademark issues and that the parties would be referred to mediation, TFN's first response was to file a trademark and unfair competition action on April 4, 2006, against Tim Oey and Jane Doe Oey in the United States District Court for the District of Arizona. Complaint for Trademark Disparagement, Injurious Falsehood, Defamation, Interference with Business Relations, Case No. CIV 06-00173-TUC-

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[4] *Cf.* 15 U.S.C. § 1125(a)(1)(B) ("misrepresents the nature, characteristics, [or] qualities [of] another person's goods, services, or commercial activities").

[5] *Cf.* Cal. Bus. & Prof. Code §§ 17200 ("unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising or any act prohibited by [§ 7500 *et seq*]"); 17500 (general prohibition of knowingly "untrue or misleading" statements).

RCC (D. Ariz. filed Apr. 14, 2006; Document 1) ("Arizona Complaint").[6] Tim Oey is a FreecycleSunnyvale member and volunteer moderator of its online group. FreecycleSunnyvale is a California unincorporated association that can only act through its members. Tim Oey and FreecycleSunnyvale are joined at the hip. An action against Tim Oey arising out of his freecycling activities is an action against FreecycleSunnyvale.

In its Arizona action, TFN attempts to plead contributory trademark infringement and trademark disparagement under § 43(a) of the Lanham Act. 15 U.S.C. § 1125(a). TFN also attempts to plead three Arizona state-law unfair competition claims. Nowhere in TFN's Arizona Complaint did The Freecycle Network disclose the existence of this pending action in the Northern District of California.

1. The Arizona Temporary Restraining Order

In the Arizona action, TFN also filed, on April 19, 2006, motions and supporting papers for a temporary restraining order and preliminary injunction, both scheduled to be heard before the Honorable Judge Raner C. Collins, United District Court Judge for the District of Arizona. The hearing was scheduled in Tucson, Arizona, on April 24, 2006. Again, nowhere in those papers did TFN disclose the existence of this pending action in the Northern District of California. Plaintiff The Freecycle Network, Inc.'s Notice of *Ex Parte* Motion and Motion for Temporary Restraining Order, Case No. CIV 06-00173-TUC-RCC (D. Ariz. filed Apr. 19, 2006; Document 5); Plaintiff The Freecycle Network, Inc.'s Notice of Motion and Motion for Preliminary Injunction, Case No. CIV 06-00173-TUC-RCC (D.Ariz. filed Apr. 19, 2006; Document 6); The Freecycle Network Inc.'s Memorandum of Points and Authorities in Support of *Ex Parte* Motion for Temporary Restraining Order and Motion for Preliminary Injunction (D.Ariz. filed Apr. 19, 2006; Document 7).

Judge Collins held the scheduled hearing on Monday, April 24, 2006. On Tuesday, April 25, 2006, Judge Collins entered a temporary restraining order against Tim Oey and "those persons in active concert and participation" with him. Order Granting The Freecycle Network's

[6] "Jane Doe Oey" was added on the allegation that "all actions taken by Defendant [Tim Oey] were taken on behalf of the marital community." Arizona Complaint ¶ 2.

Ex Parte Motion for Temporary Restraining Order, Case No. 06-CV-00173-RCC (D. Ariz. Apr. 25, 2006; Document 18) ("TRO"). Judge Collins also set a hearing on the motion for a preliminary injunction for Tuesday, May 9, 2006. Civil Order – Minute Entry, CIV 06-173-TUC-RCC (D. Ariz. Apr. 25, 2006; Document 19).

The TRO, which TFN drafted, makes preliminary findings, including a finding that Tim Oey "has induced infringement of The Freecycle Network's intellectual property, including its trademarks." TRO at p.1. The broadly worded prohibitions of the TRO prohibit "directly or indirectly inducing infringement," "disparaging The Freecycle Network's intellectual property," and "disseminating false and misleading statements." *Id.* at p. 2.

Even though FreecycleSunnyvale is legally distinct from Tim Oey as an individual, TFN attributes the acts of Tim Oey to FreecycleSunnyvale. On April 28, 2006, TFN contacted counsel for FreecycleSunnyvale in the Northern District of California action to complain that Tim Oey failed to comply with the TRO. Declaration of Esha Bandyopadhyay in Support of The Freecycle Network, Inc.'s *Ex Parte* Motion for Order to Show Cause Against Defendant Tim Oey Regarding Contempt Due to Failure to Comply with Temporary Restraining Order and Sanctions, Case No. CIV 06-00173-TUC-RCC (D. Ariz. filed May 2, 2006; Document 22). Counsel for FreecycleSunnyvale before this Court does not represent Tim Oey as an individual in the Arizona action. By contacting counsel for FreecycleSunnyvale before this Court, TFN seeks to enforce the Arizona TRO against FreecycleSunnyvale on the basis of Tim Oey's alleged conduct.

2. Exhibits to the Arizona Complaint

The exhibits to TFN's Arizona Complaint provide examples of the kinds of acts on which TFN bases its allegations of contributory infringement and unfair competition under § 43(a) of the Lanham Act. 15 U.S.C. § 1125(a). In this Court, FreecycleSunnyvale also attached exhibits to its Amended Complaint, and TFN's answer does not deny those exhibits. Answer and Counterclaims ¶¶ 23, 24 (admitting that Exhibits 1-6 "appear to be" what they are and that the language of . . . Exhibits 2-6 speak for themselves"). Taken together, these exhibits show that, in both actions, TFN's trademark and unfair competition allegations seek to halt a public debate over the issues of whether the generic use of "freecycle" should continue or whether TFN should assert trademark rights.

TFN's efforts to control "freecycle" by asserting trademark rights arises out of a history that has gone through three stages. First, through August 2004, TFN and the general public used "freecycle" as a generic term. *See* Amended Complaint ¶¶ 23, 24, Exhibits 1-6.

Second, from September 2004, through May 2005, Freecycle Sunnyvale and Tim Oey at first supported TFN's efforts to obtain trademark rights in "freecycle." *See* Arizona Complaint, Exhibits A-C.

Third, not later than September, 2005, FreecycleSunnyvale and Tim Oey started to voice the opinions that "freecycle" should be left in the public domain and that TFN should not seek trademark rights. *See* Arizona Complaint, Exhibits D-G.

TFN's exhibits to the Arizona Complaint indicate the kinds of public advocacy that TFN, in its allegations in both actions, equates to trademark infringement and unfair competition. Tim Oey and, by association, FreecycleSunnyvale:

(1) expressed the opinion that, after another entity abandoned an application for the word "freecycle" and because TFN's application did not cover the word "freecycle," there were no viable trademark registration applications for "freecycle," Arizona Complaint, Exhibit D;

(2) urged others to visit the United States Patent and Trademark Office web site to learn about TFN's trademark registration application and, if inclined, to send a letter of opposition to the USPTO, Arizona Complaint, Exhibits D, E;

(3) encouraged others to complain to Yahoo! if they objected to the deletion of local freecycling online groups at TFN's request, Arizona Complaint, Exhibit E;

(4) encouraged others to continue to use "freecycle" as a generic term, Arizona Complaint, Exhibits D, E, F;

(5) encouraged others to take additional steps to advocate against TFN's assertion of trademark rights, including contacting local freecycling groups and taking groups out of TFN's network, all of which might "drive TFN even crazier," Arizona Complaint, Exhibit G; and

(6) criticized TFN, not only for seeking trademark rights in "freecycle," but also for suppressing discussion of the issues and not allowing a vote by local freecycling groups in TFN's network, Arizona Complaint, Exhibits E, F, G.

Perhaps the most striking point in common among all of these examples of the kinds of acts on which TFN bases its allegations of contributory trademark infringement and unfair competition is that none of these communications are directed to consumers who might use TFN's products or services. All are email communications to seasoned freecycling volunteers who will not confuse FreecycleSunnyvale with TFN or be mislead about TFN's products or services. All are nothing more than examples of Tim Oey's free speech opinions, offered in a public debate over the issues of whether the generic use of "freecycle" should continue or whether TFN should assert trademark rights.

When, for purposes of Freecycle Sunnyvale's motion to strike, Freecycle Sunnyvale's evidence is considered, TFN's state-law unfair competition counterclaim is further revealed as an attempt to stifle public debate. *See generally* Declaration of Timothy Oey in Support of Counterdefendant FreecycleSunnyvale's Motion to Strike State-Law Counterclaim under Cal. Code. Civ. Proc. § 425.16. Just seven weeks before TFN terminated FreecycleSunnyvale's online group account with Yahoo! on November 21, 2005, TFN had no problem with FreecycleSunnyvale's use of "freecycle." Paula Spencer, on TFN's behalf, wrote on September 17, 2005: "This [disagreement with Tim Oey] is not intended as any reflection on your group [FreecycleSunnyvale] and we sincerely hope that you will continue to run your list as you have in the past." *Id.*, Exhibit N. TFN's unfair competition counterclaim is not about trademarks or competition. TFN's aim is to stifle FreecycleSunnyvale's protected free speech activity. *See id.*, Exhibit 0.

IV. LEGAL STANDARD

Rule 12(b)(6) of the Federal Rules of Civil Procedure authorizes the Court to dismiss a counterclaim for "failure to state a claim upon which relief can be granted." Fed.R.Civ.P. 12(b)(6). "Dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990).

V. ARGUMENT

A. This Court Should Dismiss TFN's First Counterclaim for Infringement under § 32(1) of the Lanham Act and Contributory Infringement under § 43(a) of the Lanham Act

1. TFN Does Not Have Standing to Bring a Claim under § 32(1) Because TFN Alleges that Its "Application is Still Pending" and, Therefore, TFN Is Not a "Registrant"

Standing to sue for a claim of infringement under § 32(1) of the Lanham Act is limited to the "registrant" of a trademark. This statute defines infringement as the interstate use of a trademark "without the consent of the registrant" and provides that the infringer "shall be liable in a civil action by the registrant." 15 U.S.C. § 1114(1). *Brookfield Communications, Inc. v. West Coast Entm't Corp.*, 174 F.3d 1036, 1046 n.6 (9th Cir. 1999) ("Section 31(1) of the Lanham Act applies to federally registered marks"). *See also* 5 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 32:3, at 32-13 (4th ed. 2006) ("it is clear that plaintiff must allege that it is in fact the 'registrant' of an already issued and outstanding registration. Only the federal 'registrant' has standing to sue under the Lanham Act § 32(1).") (footnote omitted).

TFN is not a "registrant" because, as TFN alleges, TFN's "application is still pending." Answer and Counterclaims ¶ 25. TFN's allegations of the procedural posture of TFN's application, reveal the lack of a basic understanding of the trademark registration application process. *See id.* ¶ 69. Publication in the Official Gazette is not registration. Publication is public notice of an "otherwise registrable" trademark, so that those who "would be damaged by the registration" may file an opposition. 15 U.S.C. §§ 1062, 1063. After publication, a trademark may be registered, "[u]nless the mark is successfully opposed." 15 U.S.C. § 1063.

Because TFN's alleged trademarks are not registered, TFN is not, and cannot be, a "registrant" who has standing to sue for infringement under § 32(1) of the Lanham Act. There is no cognizable legal theory on which an alleged owner of an unregistered trademark can state a claim for relief under § 32(1). This much is apparent by reading the plain language of § 32(1) and obtaining a hornbook understanding of when a trademark is registered. FreecycleSunnyvale respectfully requests this Court to dismiss, with prejudice, any counterclaim based upon § 32(1) of the Lanham Act.

2. TFN Has Not Stated a Claim for Contributory Infringement Because TFN Has Not Alleged that a Third Party Infringed or That FreecycleSunnyvale Intended Third Parties to Infringe

Contributory trademark infringement requires that the defendant either "(1) intentionally induces another to infringe on a trademark, or (2) continues to supply product knowing that the recipient is using the product to engage in trademark infringement." *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264-65 (9th Cir. 1996) (*citing Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 842, 854-55 (1982)). *See also Lockheed Martin Corp. v. Network Solutions, Inc.*, 194 F.3d 980, 984 (9th Cir. 2005) ("Direct control and monitoring of the instrumentality used by a third party to infringe the plaintiff's mark permits the expansion of *Inwood Lab.*'s 'supplies a product' requirement for contributory infringement.").

Contributory trademark infringement requires that a third party must infringe, but TFN does not seem to understand that many uses of a trademark do not infringe. *Interactive Products Corp. v. a2z Mobile Office Solutions, Inc.*, 326 F.3d 687, 695 (6th Cir. 2003) (where trademark used only "in a 'non-trademark' way – that is, in a way that does not identify the source of a product – then trademark infringement and false designation of origin laws do not apply"). *See also Cairns v. Franklin Mint Co.*, 292 F.3d 1139, 1150-52 (9th Cir. 2002) (no infringement if use of trademark is nominative fair use or classic fair use under § 33(b)(4) of the Lanham Act, 15 U.S.C. § 1115(b)(4).

TFN nowhere alleges that any third party used TFN's alleged trademarks, much less that a third party used those alleged trademarks in an infringing manner. All that TFN alleges is that FreecycleSunnyvale "continues to encourage others to use The Freecycle Network's Marks." TFN's California Answer and Counterclaims ¶ 73. Even with the addition of the exhibits to TFN's Arizona Complaint, all that TFN alleges is that Tim Oey, one of FreecycleSunnyvale's members, advocated against TFN's efforts to take "freecycle" out of the public domain by asserting trademark rights. There is no allegation what a third party did, much less that a third party used TFN's alleged trademarks in a manner likely to cause confusion as to the source or origin of any freecycling activities, services, or assistance. *See M2 Software, Inc. v. Madacy Entertainment*, 421 F.3d 1073, 1080 (9th Cir. 2005) ("The test of trademark infringement under state, federal, and common law is whether there will be a likelihood of confusion.)

Nor does TFN's counterclaim contain any allegation that FreecycleSunnyvale intended, knew, or should have known that a third party would use TFN's alleged trademarks in an infringing manner. *Lockheed Martin Corp.*, 194 F.3d at 983 ("Contributory infringement occurs when the defendant either intentionally induces a third party to infringe the plaintiff's mark or supplies a product to a third party with actual or constructive knowledge that the product is being used to infringe the service mark.") A bare allegation that FreecycleSunnyvale "continues to encourage others to use" TFN's alleged trademarks falls unacceptably short of the requisite allegation that FreecycleSunnyvale intended, knew, or had reason to know that those "others" would use TFN's alleged trademarks in an infringing manner.

TFN has not alleged sufficient facts to state a counterclaim for contributory trademark infringement because TFN has not alleged that FreecycleSunnyvale intended, knew, or should have known that a third party would use the alleged trademarks in an infringing manner or, for that matter, that any third party directly infringed. TFN's counterclaim does not allege sufficient facts to state a claim for relief. Accordingly, this Court should dismiss any counterclaim for contributory trademark infringement.

B. This Court Should Dismiss TFN's Counterclaim for Unfair Competition under § 43(a) of the Lanham Act

1. TFN's Quotation of Statutory Language Does Not Allege a Recognized Cause of Action for Unfair Competition under § 43(a)

Courts recognize distinct claims for relief under § 43(a) of the Lanham Act. 15 U.S.C. § 1125(a). *See, e.g., Jarrow Formulas, Inc. v. Nutrition Now, Inc.*, 304 F.3d 829, 835 n.4 (9th Cir. 2002) (elements for § 43(a) false advertisement claim); *Wendt v. Host International, Inc.*, 125 F.3d 806, 812 (9th Cir. 1997) (recognizing § 43(a) false endorsement claim); *Sun Microsystems, Inc. v. Microsoft, Corp.*, 999 F.Supp. 1301, 1308 (N.D. Cal. 1998) (elements for § 43(a) trademark infringement claim). *See also* 4 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 28:15 (4th ed. 2006) (elements for § 43(a) false endorsement claim).

Each of these claims has its own distinctive requirements. *See, e.g., Jack Russell v. American Kennel Club*, 407 F.3d 1027, 1037 (9th Cir. 2005) (contrasting "different standing requirements" for false advertisement and false endorsement).

TFN's second counterclaim provides no clue as to which, if any, of the recognized claims for relief under § 43(a) of the Lanham Act is alleged. This counterclaim incorporates, as discussed already, a defective claim for infringement under § 32(1) of the Lanham Act and a defective claim for contributory infringement under § 43(a). This counterclaim then quotes from § 43(a). TFN's federal unfair competition claim is uninformed by any of the judicially created elements for recognized claims under § 43(a). FreecycleSunnyvale submits that TFN's method of pleading is hopelessly vague and fails to allege sufficient facts to state a claim for relief, much less to enable FreecycleSunnyvale to frame a response.

2. TFN Has Not Alleged the Fundamental Elements, under § 43(a) of the Lanham Act, of a Protectable Trademark Interest or a Likelihood of Consumer Confusion or Deception

Regardless of which § 43(a) claim, if any, TFN intended to allege in its federal unfair competition counterclaim, TFN has failed to allege two of the most basic and fundamental elements to any claim under § 43(a) of the Lanham Act. 15 U.S.C. § 1125(a). First, TFN has failed to allege sufficient facts to show that its counterclaim is based upon a distinctive identity or mark.

> Because Echo Drain has not obtained a federal trademark registration, it must prove that the Echo Drain mark is protectable. In order to establish that it has a protectable trademark, Echo Drain must prove (1) that its mark is inherently distinctive or (2) that the mark has acquired distinctiveness through secondary meaning.

Echo Drain v. Newsted, 307 F. Supp. 2d 1116, 1121 (C.D. Cal. 2003) (citations omitted).

Perhaps TFN believes, erroneously, that it has alleged a *protectable* trademark by virtue of allegations about the status of its trademark registration application. If a registration had issued and TFN's alleged trademarks were placed on the principal register, the Lanham Act would provide that registration is *prima facie* evidence of validity and ownership. 15 U.S.C. §§ 1057(b), 1115(a). Because TFN's registration application is pending, TFN's alleged marks are not registered. TFN cannot rely on the statutory presumption to plead *prima facie* allegations of a protectable trademark.

Due to TFN's lack of a basic understanding of the trademark registration application process and trademark law generally, TFN's counterclaims fail to allege an alternate basis for a protectable trademark interest. While TFN alleged that it owns "distinctive" trademarks, TFN nowhere asserts that its alleged marks are *inherently* distinctive. Answer and Counterclaims ¶ 67. *See KP Permanent Make-up, Inc. v. Lasting Impression I, Inc*., 408 F.3d 596, 603 (9th Cir. 2005) (generic and descriptive terms are not inherently distinctiveness).

Nor has TFN alleged that its alleged trademarks have acquired distinctiveness through secondary meaning. *See Grupo Gigante S.A. de C.V. v. Dallo & Co., Inc*., 391 F.3d 1088, 1095-96 (9th Cir. 2004) (explaining secondary meaning). While TFN has alleged that TFN is famous and that TFN has goodwill, those allegations miss the mark. Answer and Counterclaims ¶ 69. The fact that a company is famous or that a company has goodwill says nothing about whether the name that the company uses on its products or services distinguishes the company's products or services because consumers associate that name with a single source of the products or services.

Further, nowhere does TFN allege a likelihood that consumers will be confused or misled by FreecycleSunnyvale's use of "freecycle," allegations that lie at the heart of any § 43(a) trademark infringement or unfair competition claim. *See M2 Software, Inc. v. Madacy Entertainment*, 421 F.3d 1073, 1080 & n.5 (9th Cir. 2005) (claims for trademark infringement or unfair competition under federal, state, or common law must establish likelihood of confusion); *See also Jarrow Formulas, Inc.*, 304 F.3d at 835 n.4 (in false advertising claim, false statement has "tendency to deceive a substantial segment of its audience"); *Wendt*, 125 F.3d at 812 (in false endorsement claim, "likely to confuse consumers as to the plaintiff's sponsorship") (quotation omitted). TFN complains only that FreecycleSunnyvale expressed its opinions to seasoned freecycling volunteers.

Because TFN has failed to allege a protectable trademark interest or whether consumers are likely to be confused or misled, FreecycleSunnyvale is at a further loss to understand which, if any, of the recognized claims under § 43(a) of the Lanham Act might be pled in TFN's federal unfair competition counterclaim. TFN has not alleged sufficient facts to state a claim for relief. Accordingly, this Court should dismiss TFN's federal unfair competition counterclaim.

C. This Court Should Strike TFN's State-Law Counterclaim Because TFN's Counterclaim is Based Upon FreecycleSunnyvale's Protected Free Speech Activities in Violation of California's Anti-SLAPP Statute, Cal.Code.Civ.Proc. § 425.16

This Court should strike TFN's state-law counterclaim as a 'strategic lawsuit against public participation.' Cal. Civ. Proc. Code § 425.16.[7] Under California's Anti-SLAPP law, a defendant may move to strike a state-law claim if plaintiff's claim "aris[es] from any act of that person [the defendant] in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue." Cal. Civ. Proc. Code § 425.16(b)(1). The burden then shifts to the plaintiff to provide evidence for the court to

[7] By focusing upon its motion to strike under California's anti-SLAPP statute, FreecycleSunnyvale does not mean to imply that TFN has adequately pled a claim for relief under Cal. Bus. & Prof. Code §§ 17200 and 17500. To the contrary, TFN's allegations of California state-law unfair competition incorporate defective claims for federal trademark infringement, contributory infringement, and unfair competition, adding only quotations from the California statutes. These allegations are hopelessly vague, fail to put FreecycleSunnyvale on notice of how to frame a response, and should be dismissed for those reasons alone. Rather, FreecycleSunnvale focuses upon its motion to strike so that this Court may remove TFN's California state-law claim once and for all.

determine "that there is a probability that the plaintiff will prevail on the claim." *Id*. *See also* Cal. Civ. Proc. Code § 425.16(f) ("hearing not more than 30 days after the service of the motion"). If the plaintiff does not satisfy that burden, the claim is subject to dismissal under the statute. *See also id*. at § 425.16(b)(2) ("court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based").

Although California's anti-SLAPP statute appears in the state's code of civil procedure, this statute is substantive.

> First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. . . . If the court finds that such a showing has been made, it must then determine whether the plaintiff has demonstrated a probability of prevailing on the claim.

Navellier v. Sletten, 29 Cal. 4th 82, 88 (2002). *See Equilon Enterprises, LLC v. Consumer Cause, Inc*., 29 Cal.4th 53, 67 (2002) (same). *See also Thomas v. Fry's Electronics, Inc*., 400 F.3d 1206, 1206-07 (9th Cir. 2005) ("California anti-SLAPP motions to strike and entitlement to fees and costs are available to litigants proceeding in federal court, and . . . these provisions do not conflict with the Federal Rules of Civil Procedure").

1. TFN's State-Law Counterclaim Arises from FreecycleSunnyvale's Protected Free Speech Activities

First, FreecycleSunnyvale has made the required threshold showing that TFN's counterclaim arises from protected activity. FreecycleSunnyvale need not show that TFN intended to chill free speech or that FreecycleSunnyvale's speech is constitutionally protected. *Navellier*, 29 Cal. 4th at 94-95 (not required to show constitutionally protected); *Equilon Enterprises,* 29 Cal. 4th at 66-67 (no intent-to-chill requirement). FreecycleSunnyvale need only show that "defendant's conduct by which plaintiff claims to have been injured falls wining one of the four categories described in [of Cal. Civ. Proc. Code § 425.16(e)]." *Equilon Enterprises,* 29 Cal. 4th at 66.

The kinds of acts on which TFN bases its trademark and unfair competition counterclaims fall within at least one of the categories in § 425.16(e). Cal. Civ. Proc. Code § 425.16(e)(3) ("any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest"). FreecycleSunnyvale is participating in the debate over the issues of whether the generic use of "freecycle" should continue or whether TFN should assert trademark rights. That debate is taking place in online groups that provide internet fora for public discussion. *See also* Cal. Civ. Proc. Code § 425.16(e)(4) ("any other conduct in furtherance of the exercise of . . . the constitutional right of free speech in connection with a public issue or an issue of public interest").

Further, TFN's state-law unfair competition counterclaim arises from FreecycleSunnyvale's protected free speech activities. "[T]he critical point is whether the plaintiff's cause of action itself was *based on* an act in furtherance of the defendant's right of petition or free speech." *City of Cotati v. Cashman*, 29 Cal.4th 69, 78 (2002) (emphasis in original). This action and the Arizona action arise out of the same facts and involve the same issues, and TFN treats the acts of Tim Oey as the acts of FreecycleSunnyvale. The acts that TFN alleges as examples of unfair competition in its Arizona action disclose the acts on which TFN bases its state-law counterclaim in the action before this Court. Those acts are FreecycleSunnyvale's protected free speech activities.

2. TFN Cannot Show a Probability of Prevailing on Its State-Law Unfair Competition Counterclaim

Second, the burden shifts to TFN to show a probability of prevailing on the claim. To carry this burden, TFN must "have stated and substantiated a legally sufficient claim." *Navellier*, 29 Cal. 4th at 88 (internal quotation omitted). "Put another way, the plaintiff must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." *Id*. at 88-89 (internal quotation omitted).

Not only has TFN failed to allege a California unfair competition counterclaim in this Court, but TFN cannot substantiate such a counterclaim. TFN's state-law unfair competition counterclaim targets FreecycleSunnyvale's protected free speech activities in advocating against TFN's efforts to remove "freecycle" from the public domain and to assert trademark rights over "freecycle." FreecycleSunnyvale's advocacy is not about any products or services offered by TFN or by local freecycling groups within its network. Nor is FreecycleSunnyvale's advocacy directed at consumers who, in this instance, are individuals who visit local online groups to freecycle unwanted items. Rather, as the exhibits to TFN's Arizona Complaint and Tim Oey's Declaration reveal, Freecycle's advocacy is non-commercial speech that is directed to seasoned volunteers in the grassroots freecycling movement.

FreecycleSunnyvale, for its part, believes that the grassroots freecycling movement is best served by the continued free and open use of "freecycle" so that those in the freecycling movement can continue to use "freecycle," and its variants, as nouns to name their activities and participants, verbs to express their actions, and adjectives to describe themselves. TFN's California state-law unfair competition claim seeks relief that would prevent FreecycleSunnyvale and its members, including Tim Oey, from engaging in this public debate. FreecycleSunnyvale therefore respectfully requests this Court to find that FreecycleSunnyvale has made its threshold showing that TFN's state-law counterclaim arises out of FreecycleSunnyvale's protected activity. FreecycleSunnyvale also respectfully requests this court to strike TFN's state-law counterclaim or, in the alternative, to order TFN to demonstrate a probability of prevailing on TFN's state-law unfair competition claim.

VI. CONCLUSION

FreecycleSunnyvale respectfully submits that TFN must, at a minimum, re-plead its counterclaims because TFN alleged that it's trademark registration "application is still pending," thereby establishing that TFN is not a "registrant" with standing to bring an action for infringement under § 32(1) of the Lanham Act. 15 U.S.C. § 1114(1). Because TFN likely cannot cure the deficiencies in its counterclaims under § 43(a) of the Lanham Act or California state law, this Court should also dismiss those counterclaims. 15 U.S.C. § 1114(1); Cal. Bus. & Prof. Code §§ 17200 and 17500. Finally, this court should strike TFN's state-law counterclaim under California's anti-SLAPP law or, in the alternative, order TFN to demonstrate a probability of prevailing. Cal. Civ. Proc. Code § 425.16.

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